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IN THE

Supreme Court of the United States

October Term, 1961

No. 177

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

On Appeal From the United States District Court
For the Eastern District of New York

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three-judge district court denying the application of these appellants for a preliminary injunction has not been reported. A copy thereof is set forth in Appendix A, *infra*.

Jurisdiction

On May 10, 1962 a hearing was held on the motion made by the plaintiffs herein for a preliminary injunction before a three-judge statutory court. On May 14, 1962 the said Court denied plaintiffs' motion without opinion. A copy of this decision is set forth in Appendix B, *infra*.

Upon submission of a proposed order by plaintiffs, the Learned Court issued an amended opinion as set forth in Appendix A, *infra*. An order was duly entered by the three-judge statutory court on May 22, 1962, denying plaintiffs' application for a preliminary injunction.

Plaintiffs' motion was for a preliminary injunction, restraining the defendants, their agents, servants and successors in office from the enforcement and execution of Chapter 980 of the 1961 Laws of the State of New York, claiming said Act to be in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. A Notice of Appeal to this Court was filed in the district court on May 23, 1962. Jurisdiction of this Court to review on direct appeal the decision of the District Court denying the application for a preliminary injunction is conferred by 28 U. S. C. 1253.

Questions Presented

Whether the Learned Court presiding on plaintiffs' application for a preliminary injunction, abused its discretion in denying said application?

Whether in the light of the *uncontradicted* proof submitted by the plaintiffs, as indicated by the record herewith of the hearing held on May 10, 1962, wherein plaintiffs clearly established a constitutional violation of their rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in the form of a five (5) mile "color line" between Negro and White, under Chapter 980 of the 1961 Laws of the State of New York, and pursuant to which approximately nine thousand (9,000) Negroes were being deprived of their right to vote in the newly proposed Sixth Congressional District, a preliminary injunction should not have been issued as a matter of law?

Statement

a) The Complaint

This action was brought under the Civil Rights Act, U. S. C. Title 42, Sections 1981 and 1983, and under U. S. C. Title 28, Sections 1343, 2201 and 2202. The individual appellants are Negro citizens and voters in the present Fourth Congressional District (destined to become the newly proposed Sixth Congressional District, pursuant to Chapter 980 of the 1961 Laws of the State of New York). They are residents in an area (designated as area "A" of Plaintiffs' Exhibit No. 3 attached to the complaint), and who, in association with approximately seventeen thousand (17,000) other Negroes (approximately nine thousand (9,000) of whom are voters) are being transferred from the present Fourth Congressional District to the newly proposed Seventh Congressional District pursuant to Chapter 980 of the 1961 Laws of the State of New York.

This suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and voters similarly situated.

The appellees are: The Governor of the State of New York; the Secretary of State for the State of New York; the Attorney General of the State of New York; the Commissioners of the Board of Elections of the City of New York; and the incumbent Congressman who will run for re-election in the newly proposed Sixth Congressional District.

The complaint alleges that all of the appellees performed or will be required to perform official functions arising out of the legislative congressional re-apportionment act of the State of New York, entitled Chapter 980 of the 1961 Laws of the State of New York; or have the

duty to enforce such law; or will run as a congressional candidate in the very district where the constitutional violation is claimed to exist.

The complaint alleges that the appellants are being denied due process and equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States; and further, that they have been excluded from the newly proposed Sixth Congressional District because of their race and color in violation of the Fifteenth Amendment to the Constitution of the United States.

The complaint alleges two causes of action. The first—that a "color line" was drawn to segregate the Negro from the White citizens, and as a result of which approximately seventeen thousand (17,000) Negroes have been removed from the newly proposed Sixth Congressional District and placed into the newly proposed Seventh Congressional District. That in addition, a second area was taken from the newly proposed Seventh Congressional District and added to the newly proposed Sixth Congressional District and which area consists of only White citizens stopping at that line where colored citizens reside. These two areas, combined with a third area already existing on the southern perimeter of the newly proposed Sixth Congressional District (namely Jamaica Avenue), actually form a "color line" five (5) miles in length, on one side of which line we find exclusively White citizens and on the other side we find exclusively Negro citizens.

On May 10, 1962 plaintiffs presented evidence and witnesses (four (4) in number), to prove that there was in fact a "color line" dividing the White from the Negro, and which line extended itself five (5) miles in length, and which line formed the southern perimeter of the newly proposed Sixth Congressional District and the northern boundary of the newly proposed Seventh Con-

gressional District. Appellants' testimony was *uncontradicted* as indicated in the order of the three-judge statutory court dated May 22, 1962, Appendix C, *infra*.

Reference to the record of the testimony given at the hearing in the district court on May 10, 1962, will indicate the following:

a. The witness, William Nance, testified that he was an American citizen; a member of the Negro race residing in the area which was being removed from the newly proposed Sixth Congressional District and placed into the newly proposed Seventh Congressional District (pp. 12-13); that he objected to Chapter 980 of the 1961 Laws of the State of New York (p. 19); that he signed petitions with others voicing such protest before said law was passed (p. 13) on the ground that the law created a "black belt" (p. 22); that it was segregating the Negro people (p. 24); and that a line was being drawn around an all-colored neighborhood (p. 25).

b. The witness, Walter Sommer, a police officer of the City of New York, testified that he resided in a White area two blocks from the "color line" and that when you came to Hollis Avenue (part of the alleged "color line") and crossed it, you entered a colored area (p. 39); that the part of Springfield Boulevard used as one of the boundaries of the newly proposed lines, actually divides Negro from White (p. 40); that these lines clearly divide Negro from White, and which lines extend from Springfield Boulevard to Hollis Avenue (also part of the newly proposed lines) (p. 41); that Hollis Avenue itself is a "color line" (p. 42); and that Jamaica Avenue is also a "color line" dividing Negro from White (p. 42).

c. The witness Esiah Friedman, a Lieutenant of the Police Department of the City of New York, testified that Archer Avenue is a "color line"; that south of said line

you find only Negro and north of said line you find only White (pp. 52-53); that Archer Avenue has erected thereon for a distance of one and one-half miles, a cement wall which physically divides the White from the Negro (p. 53); that he actually measured, with a scale on a map and the speedometer in his radio car, the total distance of this "color line", south of which you find only Negro and north of which you find only White, and found this distance to be five (5) miles in length (p. 54).

d. The witness Michael Dubin, testified as an expert on congressional re-apportionment, using figures of the 1961 census (p. 69) and obtained his figures from the Census Bureau in Washington, D. C. (p. 70); and which were confirmed by the Board of Health tracts (p. 71); that the present Fourth Congressional District has nineteen thousand (19,000) Negroes and the newly proposed Sixth Congressional District, replacing it has only three thousand five hundred (3,500) Negroes (p. 71); that the appellants—Negroes—are being removed from the newly proposed Sixth Congressional District, which is the smallest congressional district in Queens, and placed into the newly proposed Seventh Congressional District, which is the largest congressional district in Queens (p. 70); that the newly proposed Seventh Congressional District would have ninety-five thousand (95,000) Negroes (p. 72); as compared to the newly proposed Sixth Congressional District with only three thousand four hundred (3,400) Negroes (p. 72); that the study by this expert witness and the figures which he presented in court confirmed the testimony previously given by the police officers, that there was an actual "color line" five (5) miles in length drawn under Chapter 980 of the 1961 Laws of the State of New York (p. 71); that the newly proposed Sixth Congressional District which has two hundred thousand (200,000) voters, will only have fifteen hundred (1,500)

Negro voters therein, (p. 90); and that the lines drawn on the map (Plaintiffs' Exhibit Nos 3 attached to the complaint) were in fact drawn by this witness and is a visual representation of the lines set forth by Chapter 980 of the 1961 Laws of the State of New York. (70).

The record is therefore crystal clear, and *uncontradicted*, that almost the entire southern boundary of the newly proposed Sixth Congressional District, and which, in turn forms the northern boundary of the newly proposed Seventh Congressional District, is a "color line", with White citizens on one side of the street and Negro citizens on the other, for a distance of five (5) miles. That part of this division is in the form of a cement wall, extending itself for a distance of approximately one and one-half miles. That these appellants—Negro citizens, who are entitled to vote in the next congressional election, are being removed from the newly proposed Sixth Congressional District with approximately fifteen thousand (15,000) additional Negroes, taking them from the smallest proposed congressional district in Queens, and placing them into the largest proposed congressional district in Queens. That in the course of such removal, these fifteen thousand (15,000) Negroes of which the appellants are part, are being made to join an additional eighty thousand (80,000) Negro persons to form a "black belt" of approximately ninety-five thousand (95,000) Negro people. That in so removing there has been created a "color line" five (5) miles in length as hereinabove set forth. That such removal from one district into another is clearly based upon segregation between Negro and White and these appellants were only so removed because of their race and color.

The three-judge court initially denied plaintiffs' application for a preliminary injunction by its decision of May

14, 1962 and which decision was rendered two days before respective counsel were to be given the opportunity of submitting briefs (R. pp. 99, 101). This decision set the date of trial for May 21, 1962, before defendants' answers were actually due.

In its amended opinion dated May 17, 1962 the said Learned Court reaffirmed its denial of plaintiffs' application for a preliminary injunction on the ground "that no good cause" has been shown for the granting of such motion. It is respectfully submitted by these appellants that since the Court presiding on the motion for a preliminary injunction has set this cause down for trial, confirmation was thereby given that a *prima facie* case had been made out by the said plaintiffs. Since this *prima facie* case was uncontradicted, as is set forth in the order of the Learned Court itself, dated May 22, 1962, Appendix A, *infra*, the preliminary injunction should have been granted as a matter of law. That the Learned Court abused its discretion in denying plaintiffs' application for a preliminary injunction.

The Question Presented Is Substantial

The question herein presented is substantial because the complaint sets forth, and uncontradicted proof thereof was given at the time of the hearing on plaintiffs' application for a preliminary injunction, the very same issues which were raised in the case of *Gomillion, et al* v. *Lightfoot*, No. 32, October Term, 1960, and decided on November 14, 1960.

The *Gomillion* case established, conclusively, that where legislation is enacted "that segregates white and colored voters, by fencing Negro citizens out" we have a violation of the Fifteenth Amendment to the Constitution of the

United States. In the *Gomillion* case, lines were drawn between white and colored in order to keep the colored from voting in the City of Tuskegee, Alabama. In the case at Bar the lines were drawn, with equal clarity, between white and colored to keep the colored from voting in the newly proposed Sixth Congressional District of Queens. In so doing, this unconstitutional Act removes fifteen thousand (15,000) Negroes, nine thousand (9,000) of whom are voters, from the smallest congressional district in Queens, into the largest.

The record is clear, and the Court may take judicial notice, that of the four (4) congressional districts in the Borough of Queens, the only one which has a Republican incumbent, is the present Fourth Congressional District, which is to become the Sixth Congressional District. That the other three (3) congressional districts are preponderantly Democratic. That obviously, these plaintiffs, and the class they represent are being removed from the newly proposed Sixth Congressional District on the theory that every Negro voter is potentially a Democratic voter, in order to make the newly proposed Sixth Congressional District, safe for the present Republican incumbent.

The record is clear that in the case at bar we have physical division and segregation of races as was the case in the *Gomillion*, for these appellants, and the class they represent, are being removed from the newly proposed Sixth Congressional District solely by reason of their race and color, by a line "as clear a cleavage as a knife drawn right through the district" (R. p. 35). That this cleavage in the form of a "color line" is a highly irregular line" that has an appendix and a curve, indentures and a triangle" (R. p. 35; Plaintiffs' Exhibit No. 3 attached to the complaint).

As in the case of *Gomillion*, and using the words of Mr. Justice Frankfurter:

> "These allegations if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."

To say that these appellants have the right to vote in the newly proposed Seventh Congressional District, even though they have been removed from the newly proposed Sixth Congressional District by reason of their color, is not a valid argument in the same way that the colored who were removed from the City of Tuskegee had the right to vote in the new townships in which they found themselves after having been evicted from the City of Tuskegee.

As Mr. Justice Whittaker stated in his concurring opinion in the case of *Gomillion v. Lightfoot*, 346 U. S. at page 349:

> "* * * But it does seem clear to me that accomplishment of a State's purpose—to use the Court's phrase—of 'fencing Negro citizens out of' Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1 * * *."

It matters not that in *Gomillion* new municipal boundaries were established while in the case at Bar new congressional district boundaries were established. What *does* matter is that in both cases the new political boundaries demonstrate a stark pattern of segregation and discrimination against Negro citizens, because in fact they are Negroes. This has been clearly proven, without contradiction, by appellants at the hearing for a preliminary injunction. That there has been a deliberate and purposeful exclusion and removal of approximately fifteen thousand (15,000) Negroes from the newly proposed Sixth Congressional District, cannot be disputed once an examination of the "color line" as drawn, is made.

Mere segregation of races for whatever reason, is a violation of the constitutional rights of the race segregated—in this case the plaintiffs—Negro citizens, and the class they represent.

The Three-Judge Court Presiding Abused Its Discretion in Denying Plaintiffs' Application for a Preliminary Injunction

Having proved a *prima facie* case under the complaint as indicated by the fact that a trial has been requested by the learned Court Presiding; and the plaintiffs' proof having been given without contradiction, the motion for a preliminary injunction should have been granted.

In the case of *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, the Court of Appeals for the Sixth Circuit, in holding that a denial of the requested injunction was an abuse of discretion, Circuit Judge Allen wrote at page 857:

> "If injunction will issue to protect property rights and to prevent any wrong, it will issue to

protect and preserve basic civil rights such as these for which the plaintiffs seek protection. While the granting of an injunction is within the judicial discretion of the District Judge, *extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights* * * *. Equitable relief by injunction is essential in order to protect these colored children. There is no adequate remedy at law." (Emphasis supplied.)

The wrong, set forth in Chapter 980 of the 1961 Laws of the State of New York, done these plaintiffs is a continuing one, and for which there is no adequate remedy at law.

Conclusion

It is respectfully submitted that this Court has jurisdiction and should hear this appeal and in so hearing said appeal, should reverse the order of the Court below and find that plaintiffs' application for a preliminary injunction against these appellees restraining them from proceeding with the enforcement of Chapter 980 of the 1961 Laws of the State of New York, should have been granted.

Respectfully submitted,

Moses M. Falk,
Attorney for Appellants

APPENDIX A

AMENDED OPINION.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62C423

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALEER, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

MOORE, Circuit Judge, and BRUCHHAUSEN, Ch. J. and ABRUZZO, D. J.

MOSES M. FALK, New York, N. Y., for plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Albany; New York, IRVING GALT, Assistant Solicitor General and SHELDON RAAB, Deputy Assistant Attorney General, Of Counsel, for defendants, NELSON A. ROCKEFELLER, CAROLINE K. SIMON, and LOUIS J. LEFKOWITZ.

LEO A. LARKIN, Corporation Counsel of the City of New York, BENJAMIN OFFNER, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEY, Commissioners of the Board of Elections of the City of New York.

IRVING D. GOLDSTEIN, New York, N. Y., for defendant SEYMOUR HALPERN.

PER CURIAM

After hearing the witnesses produced by plaintiffs and considering their testimony, the exhibits and the arguments upon the hearing and in briefs of counsel for the respective parties, the court is of the opinion that no good cause has been shown for the granting of a preliminary injunction in advance of a trial upon which the facts necessary for a determination of the merits of this action can be fully developed. Hence, the application for a preliminary injunction is denied.

In view of the stipulation made between the parties extending the time of the Attorney General of the State of New York to answer to May 25, 1962, the *Per Curiam* opinion heretofore dated May 14, 1962, is withdrawn. Application may be made to the court to fix a trial date by any of the parties subsequent to May 25, 1962.

S/ LEONARD P. MOORE
U. S. C. J.

S/ WALTER BRUCHHAUSEN
U. S. D. J.

S/ MATTHEW T. ABRUZZO
U. S. D. J.

May 17, 1962

APPENDIX B.

DECISION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62C423

HENRY HONEYWOOD, FELICIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALTESE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

MOORE, Circuit Judge, and BRUCHHAUSEN, Ch. J. and ABRUZZO, D. J.

PER CURIAM.

Application for a preliminary injunction denied.

Case set for trial at 10:30 A.M., May 21, 1962, Room 312, United States Courthouse, Brooklyn, New York.

S/ LEONARD P. MOORE
U. S. C. J.

S/ WALTER BRUCHHAUSEN
U. S. D. J.

S/ MATTHEW T. ABRUZZO
U. S. D. J.

May 14, 1962.

MOSES M. FALK, New York, N. Y., for plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Albany, N. Y., IRVING GALT, Assistant Solicitor General and SHELDON RAAB, Deputy Assistant Attorney General, Of Counsel, for defendants, NELSON A. ROCKEFELLER, CAROLINE K. SIMON, and LOUIS J. LEFKOWITZ.

LEO A. LARKIN, Corporation Counsel of the City of New York, BENJAMIN OFFNER, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York.

IRVING D. GOLDSTEIN, New York, N. Y., for defendant SEYMOUR HALPERN.

APPENDIX C

ORDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 62C423

HENRY HONEYWOOD, FELICIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHONEY, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

HONORABLE LEONARD P. MOORE, Judge of the United States Court of Appeals, Second Circuit.

HONORABLE WALTER BRUCHHAUSEN, Chief Justice of the United States District Court, Eastern District.

HONORABLE MATTHEW T. ABRUZZO, Judge of the United States District Court, Eastern District.

The above named plaintiffs having moved this three Judge Court for an order granting a preliminary injunction and said motion having been duly heard on the 10th day of May, 1962, in the course of which the plaintiffs presented oral testimony and evidence in support of the allegations contained in the verified complaint, and after hearing witnesses produced by the plaintiffs, and upon filing the decision of this Court dated the 17th day of May, 1962,

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, Albany, New York, Irving Galt, Assistant Solicitor General and Sheldon Raab, Deputy Assistant General, Of Counsel, for defendants, Nelson A. Rockefeller, Caroline K. Simon and Louis J. Lefkowitz; Leo A. Larkin, Corporation Counsel of the City of New York, Benjamin Offner, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, Denis J. Malton, James M. Power, John R. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York; and Irving D. Goodstein, New York, New York, for the defendant, Seymour Halpern, it is

ORDERED, that the plaintiffs' application for a preliminary injunction be and the same is hereby denied; and it is further

ORDERED, that application may be made to this Court by any of the parties hereto, subsequent to May 25, 1962 to fix a date for trial of the above entitled action; ~~and it is further~~

~~ORDERED, that the trial of the above entitled action be and the same is hereby stayed pending plaintiffs' appeal from the within order of this Court to the Supreme Court~~

of the United States, upon condition that a legal and proper appeal to the said Supreme Court of the United States be filed forthwith and that said appeal be taken without delay.

Dated: Brooklyn, New York
May 18th, 1962.

LEONARD P. MOORE
LEONARD P. MOORE, U. S. C. J.

WALTER BRUCHHAUSEN
WALTER BRUCHHAUSEN, U. S. D. J.

MATTHEW T. ABRUZZO
MATTHEW T. ABRUZZO, U. S. D. J.